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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BRADLEY VAN PATTEN, an individual, on behalf of himself and all others similarly-situated, Plaintiff, vs. VERTICAL FITNESS GROUP, LLC a limited liability company; Defendants.	CASE NO.: 12cv1614-LAB-MDD CLASS ACTION **PLAINTIFF BRADLEY VAN PATTEN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR CLASS CERTIFICATION** The Honorable Larry A. Burns Date: August 12, 2013 Time: 11:30a.m. Location: Courtroom 14A

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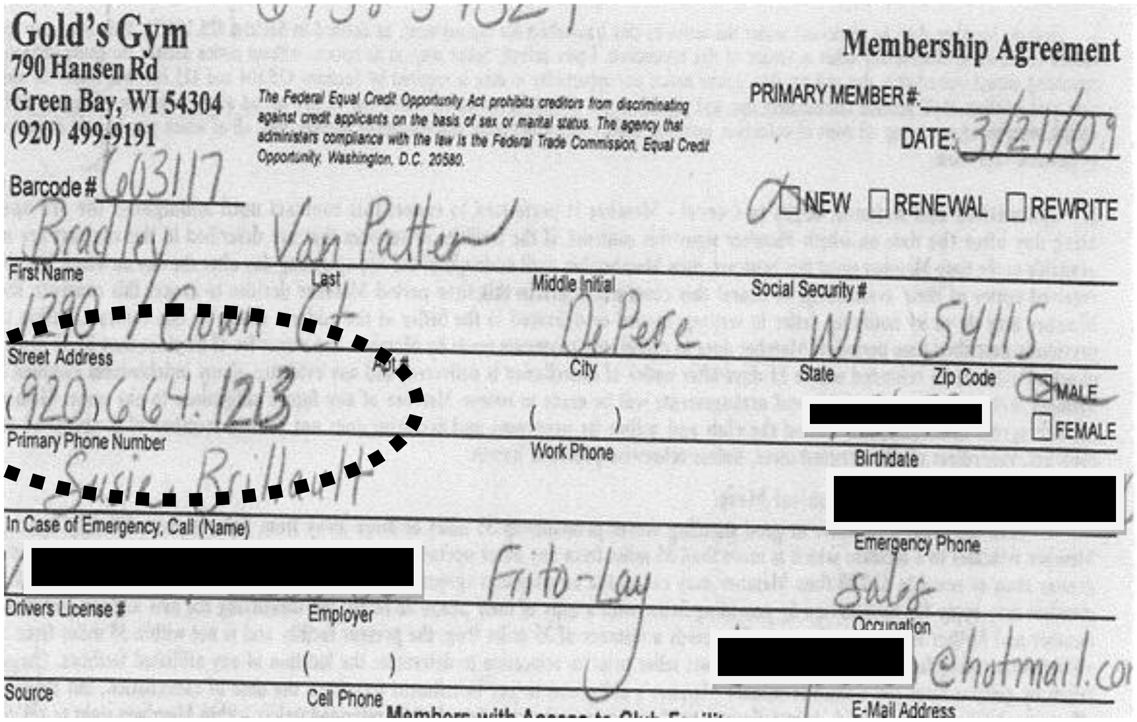
I. INTRODUCTION

Plaintiff Bradley Van Patten respectfully moves for an Order certifying a class against Defendant Vertical Fitness Group, LLC, owner and operator of 14 fitness gyms, for violation of the federal Telephone Consumer Protection Act ("TCPA"). This case is ideal for class treatment because it is really about three nearly identical marketing text message "blasts" (Defendant's own word) to an identifiable group of at least 80,355 Vertical Fitness membership applicants using a single system/piece of auto dialer software, called CallFire®. In doing so, Defendant violated the TCPA because it never obtained the required "prior express consent" from consumers before blasting them with these texts. In fact, Defendant, and its San Diego marketing vendor, Advecor, Inc., candidly admit that they never even discussed the issue of consumer consent before blasting consumers with texts. Tomasevic Decl., Ex. 1, Depo. of Advecor at 163:21 – 166:13 (Advecor's Rule 30(b)(6) designee confirms: "Consent was never discussed.")

However, this is not where Plaintiff needs to prove the merits of his case, i.e. whether or not Defendant's text blasts *actually* violated the TCPA. Rather, at issue here is *the way* Mr. Van Patten will prove his case and whether that way is amenable to class treatment under Federal Rule of Civil Procedure, Rule 23 ("Rule 23"). It is.

This action satisfies all the requirements of Federal Rule 23, is the type of case that is best litigated as a class action, and is ripe for certification. At issue are three nearly identical texts. Their content is undisputed. Their purpose – to promote profitable member sign-ups – is also undisputed – as is the way the text blasts were sent out (one company, Advecor, uploading Excel® files with member contact information into one piece of software: CallFire, and then pushing a button). It is undisputed that Defendant can ascertain exactly how many people it blasted, as well as each of those consumers' names, addresses, phone numbers and e-mail addresses.

Like most TCPA cases, a main point of contention will be whether or not these consumers expressly consented to being blasted with marketing texts. Defendant has just one theory in that regard: that simply by supplying their phone number in connection with applying for a gym membership, that all prospective members automatically and "expressly" consented to receiving marketing texts (not just informative texts about the membership) forever. For instance, Defendant points to Bradley Van Patten's long-ago-cancelled gym membership application, entered into with a different entity. Defendant points to a place where a gym manager wrote down Bradley Van Patten's phone number, and claims that this act provides the requisite "express consent" to receive marketing text blasts in perpetuity. Their defense, in short, is a filled-in blank on a form contract that says nothing about marketing texts:



Gold's Gym
790 Hansen Rd
Green Bay, WI 54304
(920) 499-9191

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of sex or marital status. The agency that administers compliance with the law is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Membership Agreement

PRIMARY MEMBER #:

DATE:

Barcode # 603117

NEW RENEWAL REWRITE

Bradley Van Patten

First Name Last Middle Initial Social Security #

Street Address City State Zip Code

(920) 664-1213

Primary Phone Number Work Phone [redacted] MALE FEMALE

Birthdate

In Case of Emergency, Call (Name) [redacted]

Emergency Phone

[redacted]

Drivers License # Employer Occupation

Frito-Lay Sales

[redacted] @hotmail.co

Source Cell Phone E-Mail Address

Tomasevic Decl., Ex. 4 (Plaintiff's Membership Agreement).

This is Defendant's one defense to consent for every class member. Because the defense is simple and hinges only on the content and interpretation of *form* contracts, there is no need to adjudicate the defense 80,355 separate times.

In short, there are substantial common questions of both law and fact that relate to claims of all of the putative class members. The TCPA claim in this action is subject to generalized, common proof, such as by simply looking at the texts themselves (one or two exhibits that will describe *everyone's* texts, like e-mails approving the form texts), the manner in which the texts were blasted (CallFire and Microsoft Excel for every text), and whether or not the form membership applications (just a few similar forms covering the entire 80,000+ member class) evidence "express consent" to receive marketing text blasts in perpetuity.

Mr. Van Patten –who despite cancelling his contract with Defendant's predecessor years before - received Defendant's texts, twice. His claims are typical of the claims of the class. Mr. Van Patten and his class counsel are adequate representatives for the class. And deciding whether the blasts were illegal, on a class basis, is manageable and far superior to the alternative: tens of thousands of separate trials about the same texts, auto dialer software, and form contracts. As explained more fully below, Mr. Van Patten's motion should be granted in full and this honorable Court should certify the following class:

> All persons in the United States and its Territories who were sent one or more unauthorized text message advertisements on behalf of Defendant.[1]

II. FURTHER BACKGROUND

A. Defendant and its Gyms

Defendant Vertical Fitness operates or promotes over a dozen "Xperience Fitness" gyms in the Midwest. Tomasevic Decl., Ex. 2, A. Berggren Depo. at 17:2 – 18:19 (Ms. Berggren is Defendant's V.P. of Human Resources, as she confirmed at 4:15-19 of her deposition transcript); Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 30:11-31:21 (Depo. of Mr. John Barton, owner and C.E.O., as Rule 30(b)(6)

[1] Excluded from the Class are Defendants and their directors, managers, and employees, and members of those individuals' immediate families.

designee); *see also* http://myxperiencefitness.com/join.html (last accessed June 14, 2013). Many of the gyms currently branded as "Xperience Fitness" were once franchises of, and known as "Gold's Gym" and operated by a separate legal entity. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 32:12-33:5. Defendant's affiliates terminated their Gold's Gym franchise agreements and "de-identified" with Gold's Gym as of May 1st, 2012. *Id.* at 39:21-40:21.

B. Defendant Uses Advecor, Inc. to Blast Texts to Current and Former Members in May and June of 2012.

Around Spring of 2012, Defendant engaged long-time marketing partner, Advecor, Inc. to market the gyms, market the new brand, and to obtain new paying gym members. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 7:15-8:23, 17:16-18:6; Advecor Depo. at 24:13-26:16 (job was to "[p]rovide marketing services to obtain new members"); 15:14-24. These marketing efforts included "text messaging blasts," one in May and two in June of 2012, to current and former members of the gyms. *Id.* at 31:7-32:7, 33:18-34:5, 82-9-12.

There was one text message blast sent to former members like Plaintiff in May of 2012. *Id.* There was an identical or nearly identical text message blast sent to the same former members (including Mr. Van Patten) in June of 2012. *See id.* at 133:9-18 (Advecor notes that the texts had "the same content" and "the same gist," but may not have been "the exact same verbatim text message"); Vert. Fitness Depo. at 15:18-16:9 (Vertical Fitness approved only "one form of a text message to go to members"), 190:21-22; Tomasevic Decl., Ex. 7, Vert. Fitness First Amended Responses to Plaintiff's First Set of Interrogatories at Interrogatory No. 1; Tomasevic Decl., Exs. 5-6. And there was a similar text message blast sent to then-current members in June of 2012 also for the purpose of selling memberships. *See id.* at 31:7-32:7.

These are the forms, and the only forms of texts approved by Vertical Fitness as part of the 2012 text blast campaign:

> Member: Only one month left to win a new Xterra. Refer as many friends as possible for more entries. Visit myxperiencefitness.com/giveaway today!
>
> Former: Gold's Gym is now Xperience Fitness. Come back today for $9.99 per month, no commitment and be entered for a chance to win a new Nissan Xterra. Visit myxperiencefitness.com/giveaway for details.

Tomasevic Decl., Ex. 6, e-mail, p. 1; Ex. 3, Vert. Fitness Depo. at 15:18-16:9, 195:11-197:10, 202:1-6.

Vertical sent the former member text blast to the same 30,355 consumers, twice – once in May and once in June. Vert. Fitness First Amended Responses to Plaintiff's First Set of Interrogatories at Interrogatory No. 1. At the time of responding to discovery it could not determine how many then-*current* members were blasted in June, but during deposition Vertical fitness confirmed that it could "comfortably" say there were at least 50,000 current members at that time. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 195:11-199:12.

C. The Blasts Are Sent Using Microsoft Excel and CallFire® Auto-Dialer Software.

Naturally, a text blaster needs phone numbers to do its job. In order to facilitate sending the texts, Defendant tapped into its stores of current and former gym member contact data. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 11:13-24, 12:7-13:23, 21:2-15. Vertical Fitness provided Advecor with access to Vertical Fitness member data that was being housed electronically by a vendor of Vertical Fitness: ABC Financial. *Id.* ABC is Vertical Fitness' billing vendor. Tomasevic Decl., Ex. 2, A. Berggren Depo. at 64:9-11. ABC also supplies Vertical Fitness' gym management system known as DataTrak, which logs most of the personal identifying information, gym activity, and billing information for both current and former gym members. *See* Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 58:3-61:1, 113:17-114:8 (using DataTrak, Defendant can produce lists or reports of members). Much of the member contact information, for both current and former gym members, was pulled right off of those members' gym membership applications, which Vertical Fitness has, and keeps "indefinitely." *Id.* at 54:24-55:19; Tomasevic Decl., Ex. 7, Vert. Fitness First Amended Responses to Plaintiff's First Set of Interrogatories at Interrogatory Nos. 11, 18.

After Defendant gave permission, Advecor then downloaded the member information electronically via .CSV file – which is readable in Microsoft Excel. *See* Tomasevic Decl., Ex. 1, Advecor Depo. at 82:13-83:3. An exemplar printout of this information is attached. Tomasevic Decl., Ex. 8. After "scrubbing" un-necessary information from the member data, Advecor then uploaded the stored data to a web-based software program called CallFire® – which Advecor has been using for years. Tomasevic Decl., Ex. 1, at 83:4 – 21. The CallFire® user – in this case Advecor on behalf of Defendant- then drafts or uploads a text message to be sent. *Id* at 129:16-130:15. Then Advecor clicks its mouse and the pre-written texts go out at the pre-determined time. *Id.* at 130:16 – 132:15.

CallFire® is a cloud-based service/program that offers "phone number, voice broadcasting & Auto Dialer Software." http://www.callfire.com/ (last accessed June 14, 2013); *see also* Tomasevic Decl., Ex. 1, Advecor Depo. at 108:7-19. CallFire® was used for *all* of the text blasts that were sent to the Vertical Fitness current and former gym members. *Id.* at 83:22-25, 113:11-21. While CallFire® may have been used on separate occasions to do the several blasts, the only thing that differed in terms of procedure each time was the member contact files, i.e. different phone numbers were uploaded for the *current* gym members as part of the third blast. *Id.* at 131:20-132:15.

D. Defendant Did Not Discuss the Issue of Consent before Blasting Consumers, but Now Claims it Comes from a Particular Part of its Membership Applications.

As with most TCPA cases, at issue here is whether the consumers "expressly" consented to receiving the blasts. Advecor confirms though, that at no point before or during the text blast campaigns did the topic of consent ever come up. Tomasevic Decl., Ex. 1, Depo. of Advecor at 163:21 – 166:13 ("Consent was never discussed.") Vertical Fitness admits that, at the time, it took *no* steps to investigate the legality or appropriateness of sending the text blasts. Tomasevic Decl., Ex. 1, Advecor Depo. at 67:23-69:24; 78:18-21. Even though no one expressly told Vertical Fitness this, Vertical Fitness simply assumed it was legal to send the blasts. *Id.* at 70:16-25 ("Q: So did you [Vertical Fitness] just assume it was legal? A. Yes").

Today, Defendant's defense in this regard focuses squarely on the membership applications. *See* Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 71:1 – 74:9. Defendant claims that simply because these consumers were members *at some point, no matter how far back in time*, that Defendant could market to them via text blasts forever. *Id.* (incl. exchange at 71:14-19: regarding former members, Vertical Fitness claims: "We still own the rights to those former members.") But Vertical Fitness actually makes no distinction between the appropriateness or legality of contacting former members versus *current* members. *Id.* at 72:1-19. The defense is the same no matter what: "because they voluntarily gave [Vertical Fitness] their contact information" on their membership agreements, which "establishe[d] a relationship," that allows those members to be contacted "for any purpose"… "[a]nd in perpetuity." *Id.* at 71:14- 74:9; 75:5- 76:10; 178:19-183:2. Defendant is using the same justification with respect to Mr. Van Patten's individual claim, i.e. that signing a contract in March 21, 2009 and generally providing his phone number at that time was "express consent" for Vertical Fitness to blast him with marketing texts – or any text for that matter - three years later. *Id.* at 76:19-78:21; 178:19-183:2; Tomasevic Decl., Ex. 4 (Plaintiff's form contract).

E. Mr. Van Patten is a Member of the Class.

Mr. Van Patten partially filled out a membership agreement with Vertical Fitness' predecessor, the owner/operator of what was called "Gold's Gym" at that time, on or around March 21, 2009. Tomasevic Decl., Ex.4. Defendant has no contract with *this* Defendant. Specifically, Mr. Van Patten was considering joining a Gold's Gym in Green Bay. He went into the gym, met with a gym manager, and helped her (witness Amy Berggren) fill out a gym Membership Agreement, which Mr. Van Patten eventually signed. *Id.;* Tomasevic Decl., Ex. 2, A. Berggren Depo. at 42:16-43:15. Mr. Van Patten's contract was a pre-printed form widely used at all gyms, with only minor differences among the gyms within the brand, such as the name and address of the club. *See* Tomasevic Decl., Ex. 2, A. Berggren Depo. at 44:24-45:17; 58:17-59:4; *see also* Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 76:19-78:2; 91:23-92:18 (form used throughout all of the Wisconsin Gyms); 94:4-95:7 (forms stayed "essentially the same" for all clubs until 2010 when they changed to a no-commitment pricing model, but there were no "significant changes").

Ms. Berggren, not Mr. Van Patten, filled out the contact information on the form Membership Agreement and put down Mr. Van Patten's phone number in the space on the front page, although Mr. Van Patten did supply that number. *See* Tomasevic Decl., Ex. 2, A. Berggren Depo. at 86:7-10. At no point did anyone ever ask Mr. Van Patten if he had any limits on how his phone number could be used. *Id.* at 95:5-96:7. Nor did anyone ever give Mr. Van Patten the option to opt-out of telephone or texting contact. *Id.* at 69:12-20. In fact, per typical practice, Vertical Fitness never offered these options. *Id; see also id.* at 56:22-57:13, 59:9-59:4 (common training re member sign-ups that is the same today); 69:12-20;

84:15-85:11 (describing Ms. Berggren's "invariable process"). Texts were simply never discussed. *Id.* at 69:12-20.

Mr. Van Patten's "membership" was very short lived. He was a member for no more than three days. Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 129:5-12. Mr. Van Patten cancelled his membership during a 3-day no-cost cancellation period. *Id.; see also* Tomasevic Decl., Ex. 4 (Mr. Van Patten's Membership Agreement, Terms of Cancellation). Mr. Van Patten never even checked into his gym after signing up. *See* Tomasevic Decl., Ex. 3, Vert. Fitness Depo. at 129:5-130:15.

About three years after Mr. Van Patten cancelled, on May 14, 2012, Xperience Fitness blasted Mr. Van Patten with its first marketing message promoting the Xperience Fitness gyms. Van Patten Decl., ¶ 2, Ex. 1. On June 25, 2012, Xperience Fitness blasted him with its second message. *Id.* Mr. Van Patten never gave anyone express consent to send those text messages. *Id.* at ¶ 2.

III. DISCUSSION: THE CLASS SHOULD BE CERTIFIED

This is a simple and straightforward case. Defendant's text blasts are either improper as a matter of law or they are not. Because the focus is wholly on the Defendant's conduct (e.g. the blasts and the form membership agreements), this case is ideal for class treatment.

A. The TCPA

The TCPA provides, in part:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> > (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

> ...
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

47 U.S.C., § 227(b).

"Prior express consent" is an affirmative defense under the TCPA for which Defendant, not Mr. Van Patten, bears the burden. *Id.; see Manfred v. Bennett Law,* PLLC, 2012 WL 6102071, at *2 (S.D. Fla. Dec.7, 2012) ("prior express consent is an affirmative defense" under TCPA); *Mais v. Gulf Coast Collection Bureau, Inc.*, 11-61936-CIV, 2013 WL 1899616 (S.D. Fla. May 8, 2013). FCC Rules hold that, to qualify for "prior express consent:"

> (a) marketers must clearly state[] that the marketer may call, and
>
> (b) the consumer must clearly express[] an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12396, para. 11. (1995).

TCPA violations, if any, occur when improper text messages are *sent*. *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 295 (N.D. Cal. 2013)

B. The Rule 23 Class Action Requirements

Plaintiffs like Mr. Van Patten must demonstrate all of the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure and must also establish at least one appropriate ground for maintaining class actions under Rule 23(b). *See Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010).

The requirements of Rule 23(a) are: (1) a class so numerous that joinder is impractical (numerosity); (2) common questions of fact or law (commonality); (3) typicality of the representatives (typicality); and (4) that the representatives will adequately protect the class (adequate representation). Fed.R.Civ.P. 23(a); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011).

A plaintiff must also satisfy one of Rule 23(b)'s provisions. The provisions at issue here are Rule 23(b)(2) which is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole;" and Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(2) and (b)(3).

While in some cases, consideration of the merits and consideration of the Rule 23 factors may "overlap;" generally, the court must not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action" unless it has to. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, fn. 6 (2011), discussing *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140 (1974); *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, 660 F.3d 1170, 1176-77 (9th Cir. 2011) (peeking at merits issues only to the extent "necessary to ensure that the question of reliance is common among all prospective class members").

C. The Rule 23(a) Prerequisites are Met Here

1. The Class is Sufficiently Numerous

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Courts routinely find the numerosity requirement satisfied when the class comprises 40 or more members. *Gomez v. Rossi Concrete,* *Inc.*, 270 F.R.D. 579, 588 (S.D. Cal. 2010), see also *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 632 (S.D. Cal. 2010). Here, the potential class consists of over 83,000 gym membership applicants. Tomasevic Decl., Ex. 7, Vert. Fitness First Amended Responses to Plaintiff's First Set of Interrogatories at Interrogatory No. 1 (over 33,000 former gym members); Vert. Fitness Depo. at 195:11-199:12 (50,000 or more then-current members). The numerosity requirement is, thus, easily met.

2. There are Common Questions of Fact and Law

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Our Ninth Circuit recently reiterated that showing questions of law or fact common to the class presents only a "limited burden." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588-89 (9th Cir. 2012). "[C]ommonality only requires a single significant question of law or fact." *Id.* (finding that the plaintiffs satisfied the commonality requirement, but later finding they failed to prove predominance under Rule 23(b)).

In this case, the questions of fact and law are not just minimally common – i.e. there is not just a "single" significant question of law or fact – they are *overwhelmingly* common. In general, the broad common question is did Defendant's texting campaign violate the one body of law at issue in this motion: the TCPA. The core sub-questions, are:

1. Did Defendant send the text blasts? It is not disputed that, in Spring of 2012, Defendant authorized and paid its marketing partner to send over 80,000 texts as part of three blasts to former and current members for the purpose of selling memberships. The text of the messages themselves, as well as who exactly they were all sent to, are also undisputed.

2. Did Defendant first obtain "prior express consent" to do so under the TCPA? This is another question that is common to every class member. This is not the time for finally deciding this merits question one way or the other. But because of *the nature of* Defendant's defense on this point (that members automatically did

so when they provided their phone numbers as a required part of the membership application process), disproving Defendant's affirmative defense at the merits stage will be a simple matter of interpreting the largely identical *form* contracts. *See, e.g.*, Tomasevic Decl., Ex. 4 (Brad Van Patten Membership Agreement, p. 1.)

3. How did Defendant send the texts and did it use an Automatic Telephone Dialing system? Again, we do not need to decide the merits of this question today. But it is certainly a question that is "common" to the class and which will be answered through common evidence: by examining the CallFire® system that Defendant admits it used uniformly for *all* of the texts, and which CallFire® itself refers to as "Auto Dialer Software."

Defendant had little trouble blasting a common message to a group of over 80,000 consumers who had in common that they had filled out forms for gym memberships, in relatively few key strokes using the same automatic software. Defendant easily grouped together these tens-of-thousands of consumers to market to them. So can this Court in deciding whether or not their privacy rights under the TCPA were violated as part of that same marketing campaign. For this reason, TCPA text (and fax) blasting cases are easily and routinely certified.

For example, our Southern District found that in such a text messaging marketing case, both common issues of fact as well as common issues of law exist under Rule 23(a)(2):

> Here, the members of the proposed class allegedly each received two text messages: one initial text message that advertised Defendant's products or services, and a second confirmatory text message following the class member's opt-out text message. Thus, in addition to sharing "a common core of salient facts," the class members share one common legal issue: whether the confirmatory text messages sent by Defendant to the class members violated the TCPA. Rule 23(a)(2) is therefore satisfied.

Lo v. Oxnard European Motors, LLC, No. 11CV1009 JLS MDD, 2011 WL 6300050, at *2 (S.D. Cal. Dec. 15, 2011); *see also Meyer v. Portfolio Recovery*

Assoc., LLC, 707 F.3d 1036, 1041 (9th Cir. 2012) (upholding District Court's provisional class certification and preliminary injunction to stop violations of the TCPA); *Malta v. Federal Home Loan Mortg. Corp.*, 10-CV-1290 BEN NLS, 2013 WL 444619 (S.D. Cal. Feb. 5, 2013) (finding that text message recipients shared "same factual circumstances" in that text "calls were made by Wells Fargo to class members" and that there were "several common questions of law, including whether Wells had violated the TCPA and whether Wells "had prior express consent for the calls"); *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292 (N.D. Cal. 2013) (certifying class of recipients of a text message promoting Stonebridge's services); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 572 (W.D. Wash. 2012) (in contested class certification motion under the TCPA, finding that all Rule 23 requirements were met and certifying nationwide class of "[a]ll persons in the United States of America who were sent, to their cellular telephone numbers, at least one unsolicited text message that marketed a Papa John's branded product, good, or service through OnTime4U [that defendant's marketing partner]). Mr. Van Patten easily meets the test for commonality here.

3. Mr. Van Patten's Claims are Typical of his Fellow Consumers

Next, Rule 23(a)(3) requires that the "claims or defenses of the representative parties be typical of the claims or defenses of the class." Typicality is satisfied if the representative's claims arise from the same course of conduct as the class claims and are based on the same legal theory. *See, e.g., Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995). Claims are typical if the claims of the named plaintiffs have a common core of salient facts with claims of the absent class members. It is not necessary that they be substantially identical. *Hanlon v. Chrysler Corp.*, 150 F.3d. 1011, 1020 (9th Cir. 1998); *Armstrong v. Davis* 275 F.3d 849, 869 (9th Cir. 2001), abrogated on other grounds as noted in *Harris v. Alvarado*, 402 Fed. Appx. 180 (9th Cir. 2010). "As long as the named representative's claim arises from the same event, practice, or course of conduct that forms the basis of the class claims, and is based upon the same legal theory, varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical." *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir.), vacated and remanded on other grounds, 459 U.S. 810 (1982); *Armstrong v. Davis* 275 F.3d 849, 869 (9th Cir. 2001).

Here, Mr. Van Patten's claims arise from the same "event, practice, or course of conduct that forms the basis of the class claims:" Defendant using an automated program to blast nearly identical texts to current and former gym members in order to sell memberships. The legal theory applicable to all is that, in doing so, Defendant violated the TCPA because it never had those members' consent to blast them.

The texting campaign is "the same event, practice, or course of conduct that forms the basis of the class claims" and the legal theories are the same for all. *See Jordan*, 669 F.2d at 1321 (9th Cir.); *Hunt v. Check Recovery Systems, Inc.*, 241 F.R.D. 505, 510-11 (N.D. Cal. 2007) (FDCPA case). Therefore, Mr. Van Patten also meets the "typicality" requirement. *Cf. Lo*, 2011 WL 6300050, at *3 (holding that because "plaintiff and the class members assert the same violation of the TCPA arising from the [] text messages sent by Defendant, Plaintiff's claims are typical of the claims of the class members"); *Kavu v. Ominipak Corp.*, 246 F.R.D. 642, 648 (W.D. Wash. 2007) (finding typicality under the TCPA where plaintiff alleged it received the same improper facsimile from the named defendant).

4. Mr. Van Patten and his Counsel will Adequately Protect the Class

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4).

Resolution of two questions determines adequacy: (1) whether the named Plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named Plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F. 3d at 1020.

Here, there is no evidence of any conflicts of interest and everyone in Plaintiff's camp shares the same interests: stopping the practice of blasting texts absent express consent, and maximizing allowable recovery (e.g. statutory damages). *Cf.* Van Patten Decl., ¶¶ 3-5.

Second, both Mr. Van Patten and his named counsel are capable of and actually have vigorously prosecuted this action. Mr. Van Patten has participated extensively in the written discovery process, strategy sessions and calls with counsel, and a deposition. He understands he might have to and will be ready to represent the class at any trial. Van Patten Decl., ¶¶ 3-5; Tomasevic Decl., ¶ 3. Mr. Van Patten chose proper counsel who are ready to pursue the rights of absent class members vigorously, as they already have, collectively, since 1995- having extensive experience in class actions in state and federal courts (including the Ninth Circuit and U.S. Supreme Court) and in collecting millions of dollars on behalf of plaintiffs. Tomasevic Dec., ¶¶ 4-13.

Because the interests of the Plaintiff and the rest of the Class members are completely congruent and because counsel is qualified, experienced, and able to prosecute this action, the adequacy requirement is fully satisfied.

D. Both Rule 23(b)(3) and 23(b)(2) are Satisfied

In addition to satisfying Rule 23(a), a putative class must also meet one of the three requirements of Rule 23(b). Plaintiffs' putative class likely meets all three and certainly meets the requirements under Rule 23(b)(2) and 23(b)(3).

1. Class Treatment is Appropriate Under Rule 23 (b)(3) Because Common Issues Regarding Defendants Uniform Conduct Predominate and Class Treatment is Superior to Tens-of-Thousands of Mini-Trials.

Predominance exists when issues are subject to generalized proof for the class members rather than individualized proof. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor* 521 U.S. 591, 623 (1997). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

As noted above in the "commonality" section, the issues in this case are not only "predominantly" common, they are overwhelmingly common. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b) (3) requirement of commonality"). The primary and predominating question here is whether blasting identical texts to sell memberships to or through consumers who simply supplied their phone numbers as part of enrolling in a gym, violated the TCPA. It makes no sense to test the same texts, same Auto Dialing software system (CallFire®), and same form membership agreements that Defendant relies on to prove its affirmative defense, at 80,000 different trials, rather than dispose of it all in Mr. Van Patten's case. For example, if this Honorable Court finds that supplying a phone number as part of the usual (and required) membership signup process is sufficient for "express consent," such a decision will apply to every one of the text blast recipients. If the Court finds, perhaps, that CallFire® is *not* an Auto-Dialer, then that too will apply to everyone who was blasted because that was the only system Defendant used. These are the big issues. These issues predominate. *Cf. Grannan v. Alliant Law Group, P.C.*, No. C10-02803 HRL, 2012 WL 216522, at * 5 (N.D.

Cal. Jan. 24, 2012) (finding predominance and superiority under a Rule 23(b)(3) TCPA settlement when defendants autodialed plaintiffs' cellular phones without their express consent); *Lo*, 2011 WL 6300050, at *2; *Kavu*, 246 F.R.D. at 650 (holding that violations of the TCPA and WCPA predominate over any individualized inquires regarding an illegal fax marketing campaign); *McClintic v. Lithia Motors, Inc.*, C11-859RAJ, 2012 WL 112211, *3 (W.D. Wash. Jan. 12, 2012) (Rule 23(b)(3) was satisfied under the TCPA when—like here—plaintiffs challenged defendants conduct of sending over 58,000 identical text messages to one "batch" of consumers' cellular phones and a second "set" of identical text messages to about 48,000 people simply because all consumers had provided contact information during a prior purchase).

Class treatment here is also "superior" to individual treatment considering the circumstances. In determining superiority of a class action to individual litigation, courts consider the interests of the individual members in controlling their own litigation, the desirability of concentrating the litigation in the particular forum, and the manageability of the class action. Fed.R.Civ.P. 23(b)(3); *see also Amchem Prods., Inc.,* 521 U.S. at 615, 117 S.Ct. 2231.

TCPA claims such as this one readily meet the "superiority" sub-prong because such claims by their nature have "individual damages [which] are small and class members are unlikely to litigate claims on their own." *Arthur v. Sallie Mae, Inc.*, C10-0198JLR, 2012 WL 90101, * 8-9 (W.D. Wash. Jan. 10, 2012); *accord Sarabri v. Weltman, Weinberg & Reis Co., L.P.A.*, 3:10-CV-1777 AJB NLS, 2012 WL 3991734, *7 (S.D. Cal. Aug. 27, 2012) (another TCPA case noting that "[t]he alternative mechanism, permitting individual lawsuits for a small statutory penalty, would be costly and duplicative."). Through the class action procedure, Mr. Van Patten's common claims can be brought in one proceeding, thereby eliminating unnecessary duplication, preserving limited judicial resources, and achieving economies of time, effort, and expense. Finally, this case, as a class action, will be manageable because it focuses on a few key exhibits, e.g. the e-mails approving the texts, information about how CallFire® and Excel were used, and the membership agreement forms. The testimony of only a few key witnesses is necessary and we can easily, and during administration, contact every single class member according to Defendant's own voluminous data once a verdict is reached. *See* Tomasevic Decl., ¶ 21, Ex. 8. Class treatment is superior. As such, Mr. Van Patten's motion should be granted in full.

2. In the alternative, Plaintiff's Class Must Be Certified Under Rule 23(b)(2) Because He Seeks the same Injunctive Relief Applicable to tens of thousands of fellow class members.

Certification under Rule 23(b)(2) is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). Rule 23(b)(2) is properly used as a vehicle in similar TCPA blasting actions where, like here, Plaintiffs are seeking an order, essentially a declaration, that such marketing efforts are illegal or otherwise improper and that they must be modified or abandoned. The *Kavu* Court, in analyzing Rule 23(b)(2) in the context of the TCPA, found certification under that provision appropriate:

> It is more unlikely that Kavu would undertake this action, particularly as a class representative, for a recovery that is unlikely to exceed $500….In addition, the damages sought are incidental to the primary claim for injunctive relief because damages are statutory and a fixed amount. Accordingly, damages may be awarded based on objective standards rather than based on complex, individual determinations. ... In this case, damages will be (1) nothing, if defendant prevails .. (2) $500 if it does not prevail … or (3) $1,500 if the Court finds that its conduct was willful…
>
> Because defendant engaged in the same conduct regarding all of the class members, the damages issues and calculations will be the same for all. Moreover, if plaintiff proves its allegations, injunctive relief

> would benefit all class members…For all of these reasons, the Court finds that certification under Rule 23(b)(2) is appropriate because Omnipak has acted on grounds generally applicable to the class, and final injunctive or declaratory relief is appropriate for the class.

Kavu, 246 F.R.D. at 649 (internal citations omitted).

Mr. Van Patten is seeking damages of a fixed amount under the TCPA based on clear allegations and supporting evidence that Defendant, in blasting texts, has acted on grounds generally applicable to the class, and final injunctive or declarative relief is appropriate for the class. Certification under Rule 23(b)(2) is appropriate. *Cf. Gonzales v. Arrow Fin. Services, LLC,* 233 F.R.D. 577, 582-83 (S.D.Cal.2006) (certifying FDCPA class under Rule 23(b)(2) where plaintiffs received "standardized" demand letters and sought declaratory relief and, like here, statutory damages).

IV. CONCLUSION

Plaintiff Bradley Van Patten respectfully requests certification of the following nationwide class under the TCPA:

> All persons in the United States and its Territories who were sent one or more unauthorized text message advertisements on behalf of Defendant.

Plaintiff also requests appointment as class representative and appointment of Nicholas & Butler, LLP and The Law Offices of George Rikos as class counsel.

DATED: June 14, 2013

Respectfully submitted,
NICHOLAS & BUTLER, LLP

/s/ Alex Tomasevic
Alex Tomasevic
Craig M. Nicholas

THE LAW OFFICES OF GEORGE RIKOS

George Rikos